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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

Jesse Brown, Secretary of Veterans Affairs,
Petitioner

v.

Fred P. Gardner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A federal statute initially enacted in 1924 as part of the "war risk insurance act" provides disability compensation to veterans injured as a result of medical treatment administered by Department of Veterans Affairs personnel. The statute was initially passed to provide a worker's compensation-type benefit to veterans, without proof of fault. Beginning in 1934, however, the VA began promulgation of various regulations designed to restrict the compensation available to veterans under the statute. These regulations variously required the veteran to present evidence of some form of fault or accident in the medical treatment as a predicate to compensation. The question in this case is whether the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit were correct in striking down the current regulation containing a fault requirement because it is inconsistent with the clearly stated intent of Congress contained in the straightforward no-fault language of the statute.

TABLE OF CONTENTS

	Page
Statement of the Case	1
Summary of the Argument	7
Reasons for Denying the Petition	9
Conclusion	33

TABLE OF AUTHORITIES

CASES:	Page
Aaron v. SEC, 446 U.S. 680, 694 (1980)	23
Adamski v. Derwinski, 2 Vet. App. 46 (1991)	32
Bethesda Hospital Assn. v. Bowen, 485 U.S. 399 (1988)	12
Boone v. Lightner, 319 U.S. 561 (1943)	18
Burnet v. Chicago Portrait Co., 285 U.S. 1 (1932)	26
Chevron v. U.S.A., Inc. v. Natural Resources Defense Council, Inc., 567 U.S. 837 (1984)	6
Commissioner v. Acker, 361 U.S. 87 (1959)	23
Conroy v. Aniskoff, 507 U.S. ___, 113 S.Ct. 1562 (1993)	10,18
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	19,20
Darby v. Cisneros, 509 U.S. ___; 113 S.Ct. 2539 (1993)	19
EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991)	26
ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988)	30
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946)	18
Fugere v. Derwinski, 1 Vet.App. 103 (1990), affd 972 F.2d 331 (Fed. Cir. 1992)	32

Gilbert v. Derwinski, 1 Vet.App. 49 (1990) 19

Hines v. Derwiniski, 2 Vet.App. 30 (1991) 32

Jones v. Derwinski, 1 Vet.App. 596 (1990) 31,32

King v. Brown, 4 Vet.App. 519 (1993) 32

King v. St. Vincent's Hospital, 502 U.S. ___, 112 S.Ct. 570 (1991) 18

Kirkhuff v. Nimmo, 683 F.2d 544 (D.C. Cir. 1982) 26

Leary v. United States, 395 U.S. 6 (1969) 22,23

Miller v. United States, 294 U.S. 435 (1935) 11,30

Moore v. Derwinski, 2 Vet.App. 67 (1992) 32

Morton v. Ruiz, 415 U.S. 199 (1974) 26

Motor Vehicle Mfrs. Assoc. of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 9,10

Murphy v. Derwinski, 1 Vet.App. 78 (1990) 19

National Muffler Dealers Ass'n, Inc. v. U.S., 440 U.S. 4727 (1979) 26

National Organization for Women, Inc. v. Scheidler, 114 S.Ct. 798 (1994) 10,19

National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. ___, 112 S.Ct. 1394 (1992) 9

Public Citizen v. U.S. Department of Justice, 491 U.S. 440 (1989) 14

Rowan Cos. v. United States, 452 U.S. 247 (1981) 23

Russello v. United States, 464 U.S. 16 (1983) 18

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 26

Tcherepnin v. Knight, 389 U.S. 332 (1967) 18

Tobler v. Derwinski, 2 Vet.App. 8 (1991) 32

United States v. Brown, 348 U.S. 110 (1954). 25

United States v. Calamaro, 354 U.S. 351 (1957) 23

United States v. Rutherford, 442 U.S. 544 (1978) 23

Zuber v. Allen, 396 U.S. 168 (1969) 23

STATUTES and REGULATIONS:

Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) 30

World War Veteran's Act, Public Law No. 68-242 (1924) 17

28 U.S.C. § 1346(b) 24
38 U.S.C. § 105 12
38 U.S.C. § 213 27
38 U.S.C. § 312 4,19
38 U.S.C. § 351 (1958) 25,26
38 U.S.C. § 501 11,30
38 U.S.C. § 1110 12,13,15
38 U.S.C. § 1121 13
38 U.S.C. § 1131 Passim
38 U.S.C. § 1151 Passim
38 U.S.C. § 1153 16
38 U.S.C. § 1155 2
38 U.S.C. § 1710 (a)(1)(D) 2
38 U.S.C. § 5107 19
38 U.S.C. § 5109 19
38 U.S.C. § 7104 (c) 4
38 U.S.C. § 7261 (a)(3)(C) 11

38 C.F.R. Part 17 2
38 C.F.R.:
Section 3.102 19
Section 3.303 (a) 19
Section 3.310 (a) 13
Section 3.358 (b)(1) 16
Section 3.358 (b)(2) 17
Section 3.358 (c)(1) 17
Section 3.358 (c)(3) 3,4,11
Section 14.507 15

VA Regulations:

No. 137 20,28
No. 157 20,28
No. 167 20,28

MISCELLANEOUS:

Administrator's Decision No. 255 (August 9, 1934) 28

Annual Report of the Secretary of Veterans Affairs, Fiscal Year 1991 3

Brief for the United States as Amicus Curiae, Conroy v. Aniskoff, 507 U.S. ____, 123 L.Ed. 2d 229 (1993) (No. 91-1353) 10

Hearings Before the House Committee on World War Veterans' Legislation, 68th Cong., 1st Sess. (1924) 17

9 Comp. Gen. 515 (1930) 28

138 Cong. Rec. S4040 (daily ed. March 20, 1992) 16,17,29

134 Cong. Rec. 31465 32

S. 2383, 102d Cong., 2d Sess. (1992) 17,29

43 Fed. Reg. 51015 (November 2, 1978) 29

Memorandum of the Solicitor (October 24, 1935) 27

O.G.C. Precedent Opinion 2-78 (October 25, 1978) 26,28,30

O.G.C. Digested Opinion 212B (March 8, 1984) 26,27

O.G.C. Precedent Opinion 80-90 (July 18, 1990) 15,18

O.G.C. Precedent Opinion 99-90 (December 24, 1990) 24,28,29

S. Rep. No. 397, 68th Cong., 1st Sess. (1924) 17

35 Op. Att'y Gen. 76 (1926) 22

36 Op. Att'y Gen. 61 (1929) 22

50 Op. VA Gen. Conv. 439 (1928) 21

65 Op. VA Gen. Conv. 429 (1930) 21

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STATEMENT OF THE CASE

Fred P. Gardner, a veteran of the Korean conflict era, underwent surgery at a VA medical facility in June of 1986 to relieve radiating back pain due to a herniated disc in the lumbar spine. While it is correct to say that the surgery was "successful in removing the herniated disc" (Pet. at 6), Mr. Gardner suffered a "bad result." Immediately after the surgery neurological damage manifested itself in his left leg. From the date of surgery, Mr. Gardner experienced severe nerve damage and muscular wasting in the left leg until he became completely disabled and was discharged to a nursing home. Today Mr. Gardner wears a leg brace, uses a cane, requires a wheel chair for hospital visits, and is disabled from employment.

Over two years after the surgery, Mr. Gardner filed a claim with the Waco, Texas, VA regional office [VARO] for disability compensation benefits afforded him by Congress under 38 U.S.C. § 1151, which provides in pertinent part as follows:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of . . . medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to . . . the veteran, disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

The VA offers two major disability benefits programs: service-connected disability compensation, for injury or disease ordinarily incurred during service (generally referred to as compensation) and non-service-connected disability pension (generally referred to as pension). By operation of Section 1151, Mr. Gardner would have been eligible for service-connected disability compensation for this surgical injury in the form of a monthly payment designed to offset the degree to which the disability would impair his ability to earn a living.[1] The rate of compensation is set by a schedule with ten percentage grades of disability based on the seriousness of the injury, ranging from 0 percent to 100 percent. See 38 U.S.C. § 1155.[2] For fiscal year 1991, the VA paid to veterans and their dependents

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[1] Under Section 1151, benefits "shall be awarded in the same manner as if such disability . . . were service-connected." These benefits are sometimes referrred to as "quasi-service-connected benefits."

[2] The establishment of service connection even at the 0 percent level may also entitle a veteran to ancillary benefits such as public employment preferences, job retention rights, and basic VA health care. See, e.g., 38 C.F.R. Part 17. If service connection were established at a 50% level, the veteran would be entitled to medical treatment for all conditions. 38 U.S.C. § 1710(a)(1)(D).

over $12.13 billion in compensation benefits and over $3.9 billion in pension benefits. Annual Report of the Secretary of Veteran Affairs, Fiscal Year 1991 at 115.

Mr. Gardner's claim was denied by the VARO in Waco, Texas. Mr. Gardner then appealed pro se to the Board of Veterans' Appeals [BVA] in Washington, D.C., which also denied the claim. The record at the VARO and the BVA unmistakably demonstrates that Mr. Gardner suffered atrophy of the musculature of the left leg secondary to the surgery, and an aggravation of a pre-existing ankle instability due to that left leg weakness. Indeed, these findings were adopted by VA decisionmakers at every level of review and accepted by the BVA in its final decision. The adverse results from the surgery were confirmed in an examination by the treating surgeon conducted on May 9, 1989, for the purpose of assisting the VA in evaluating the claim. (C.A. App. at 121).

Throughout the proceedings before the VA, the only reason given for the rejection of Mr. Gardner's claim was his failure to prove fault or accident on the part of VA medical personnel, as required by the current VA regulation implementing Section 1151 benefits. That regulation provides in pertinent part as follows:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen,

> untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

38 C.F.R. § 3.358(c)(3). Neither the VARO nor the BVA was free to decide the claim contrary to the terms of the existing regulation. 38 U.S.C. § 7104(c).

The Court of Veterans Appeals [COVA] reversed the BVA denial of benefits in a unanimous three-judge opinion authored by Chief Judge Nebeker. The decision focused on whether the VA properly implements Section 1151 benefits by requiring a showing of fault by the veteran under its regulation.[3] At that stage in the litigation, the Secretary agreed that a literal reading of the statute did not include an element of fault. (Pet. App. at 25a). Instead, the Secretary argued that giving full play to a literal reading of the statute would lead to a "ludicrous result." Id. He asserted that the words of the statute -- "injury resulting in additional disability" -- would require compensation for any change in the veteran's condition resulting from surgery, such as a surgical scar or the amputation of a gangrenous limb. The Secretary believed the fault requirement was necessary to preclude this assertedly absurd outcome resulting from a literal application of the statute.

[3] After the initial round of briefing, COVA ordered the parties sua sponte to address the issue of "whether the regulation at 38 C.F.R. § 3.358(c)(3) . . . with its inclusion of an element of fault is inconsistent with 38 U.S.C. § [1151]." Order, November 6, 1990. Thereafter, COVA invited supplemental memoranda from interested veterans' groups and appointed Mr. Gardner's present counsel of record as amicus curiae to that court. Order, March 15, 1991.

In rejecting this argument, COVA concluded there was insufficient evidence of any congressional intent to limit compensation to instances of VA fault, as the Secretary had accomplished by regulation. COVA observed that the statute imposes only two limitations on the granting of benefits: first, that the injury occurs "as a result of" medical treatment; and, second, that the injury must not be a "result of such veteran's willful misconduct." (Pet. App. at 27a). Reasoning from this structure of the statute, COVA concluded that Congress had considered the issue of fault and intentionally excluded it from the statute. COVA found that this conclusion was not contradicted by any of the legislative history. In fact, COVA observed that the legislative history surrounding the 1924 enactment was as compatible with a no-fault system as with a fault system. (Pet. App. at 29a). Finally, COVA rejected the Secretary's plea for deference to his interpretation of the statute, since the statute was plain on its face. Id.

On appeal to the Court of Appeals for the Federal Circuit, another unanimous panel affirmed the invalidity of the Secretary's fault-based regulation in the face of a new argument by the Secretary in that court. There the Secretary argued for the first time that the statute at issue was ambiguous. The Secretary suggested that the words of the statute -- "as a result of" -- were unclear and justified the adoption of the regulation requiring proof of fault as a predicate to compensation. The purpose of this change in tactics by the Secretary was to bring

Section 1151 under the deferential standard afforded an agency's interpretation of an ambiguous statute by Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). However, neither the Secretary nor his predecessors had ever in the 68 year history of the statute taken the position that the statute was ambiguous.

The Federal Circuit concluded that the language "as a result of" was not ambiguous and "mandates only a causation requirement." (Pet. App. at 7a). The Federal Circuit recognized that fault and causation are fundamentally distinct concepts in the law which Congress has routinely distinguished in other legislation. When read in its entirety, the statute makes clear that the preclusion of a fault element by Congress was both informed and intentional. (Pet. App. at 8a). The court also noted that the VA's own adjudication of Mr. Gardner's claim readily distinguished between these two elements of fault and causation.

The Federal Circuit similarly found from a review of the legislative history that "Congress's paramount concern was to compensate veterans injured by VA medical treatment." (Pet. App. at 17a). The court found no indication that Congress intended to place upon the veteran the "complex burden of proving negligence" as a condition of compensation. Id. Regarding the Secretary's request for deference to his regulatory interpretation, the Federal Circuit concluded that Congress had left no gap in the statutory mandate that would permit the exercise of discretion by

the Secretary to impose a fault requirement in the compensation process. The court need not defer to the Secretary's asserted "long-standing" interpretation of the statute because that interpretation was not contemporaneous with the statute's enactment. Finally, the court observed that VA regulations should be subjected to "vigorous review" because such regulations were never subject to judicial review until the creation of the Court of Veterans Appeals in 1988:

> Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence, however, does not in itself form a basis for us to presume they are valid and therefore defer to them.

(Pet. App. at 20a).

SUMMARY OF THE ARGUMENT

Section 1151 as enacted by Congress provides in its plain language that a veteran injured as a result of VA medical treatment is entitled to compensation for that injury without having to prove fault of any kind. The application by the Court of Veterans Appeals and the Federal Circuit of routine and well established principles of statutory construction to the plain language of Section 1151 was manifestly proper and does not require review under any precedents of this Court. Under those circumstances, there is no justification for any reference to legislative history or to an asserted "long-standing" agency interpretation of Section 1151 based on the contrived arguments by petitioner that the statute is ambiguous. This is

particularly true where the benefits of that statute must be liberally construed by the VA in favor of the veteran and against the restrictive reading given the statute.

In any event, the legislative history is consistent with the plain meaning found by the courts below. The VA's own General Counsel on no less than two occasions has rendered opinions on this issue which are in conformity with the reasoning of the courts below and contrary to the position he now takes in this Court. Similarly, the asserted "long-standing" interpretation of Section 1151 by the VA, imposing an element of fault in Section 1151 claims, is in reality a confusing maze of ambiguity and conflict, as has been conceded by the VA's General Counsel as recently as 1990. This history of the VA's efforts to limit Section 1151 benefits is a perfect example of the chaos which follows from an agency's failure to adhere to the plain meaning of Congressional enactments.

Nor is there any reason for this Court to review the judgment below in order to correct the Federal Circuit's conclusion that regulations of the Secretary should be subject to "vigorous review." The courts having exclusive jurisdiction over decisions of the Board of Veterans' Appeals should employ a vigorous review of agency regulations. Congress has narrowly circumscribed the authority of the Secretary to promulgate only regulations that are "consistent with [the] laws." The six-year history of the Court of Veterans Appeals reflects an inability or unwillingness on the part of the VA to conform its practice to

judicial review. Under the circumstances, the standard set by the Federal Circuit is entirely appropriate. In any event, this standard does not preclude deference to VA regulations under appropriate circumstances.

REASONS FOR DENYING THE PETITION

The decision of the Court of Appeals is correct and reflects a routine application of well-recognized principles of statutory construction. The asserted economic impact of that decision does not merit review by this Court.

1. The statute unambiguously does not require a showing of fault by the veteran as a predicate to Section 1151 compensation.

The Secretary argues that enactment of the VA's fault-based regulation "involves a routine sort of statutory interpretation that is not precluded by the 'plain' language of Section 1151." (Pet. at 12). The Secretary contrives an argument that the words "injury" and "as a result of" as used in the statute by Congress are ambiguous and require the fault-based regulation. The VA, however, has never asserted these arguments as support for the regulation in the 66 years that preceded this litigation. The Secretary is seeking deference to an interpretation which is a "post hoc rationalization of government lawyers" and to an "inference[] derived from reading between the lines of an agency decision or excerpted from the brief of a government lawyer." National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. ___, 112 S.Ct. 1394, 1405 (1992) (White, J., dissenting); Motor

Vehicle Mfrs. Assoc. of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 50 (1983).

Far from being a "routine sort of statutory interpretation," the Secretary's regulation is directly contrary to an unambiguous statutory mandate that "would not warrant a different construction" or deference to an ill-conceived formulation of misguided agency policy. National Organization for Women, Inc. v. Scheidler, 114 S.Ct. 798 (1994). The petition also ignores the contrary position taken by the Solicitor General in this Court's decision in Conroy v. Aniskoff, 507 U.S. ___, 113 S.Ct. 1562 (1993), dealing with an interpretation of the Soldiers' and Sailors' Civil Relief Act of 1940. In that case, the Solicitor General as amicus curiae argued successfully as follows:

> [T]he unambiguous text of Section 525 renders legislative history irrelevant.
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> * * * * *
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> And where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"
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> * * * * *
>
> [E]ven if there were ambiguity in the statute, it would have to be resolved in favor of the service member "under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."

Brief for the United States as Amicus Curiae at 6, 9-10, and 21-22, Conroy v. Aniskoff, 507 U.S. ___, (1993)(No. 91-1353) (citations omitted).

Under 38 U.S.C. § 501(a) the Secretary is empowered only to enact regulations "necessary and appropriate to carry out the laws administered" and which are "consistent with those laws." This Court has previously reviewed the Secretary's authority under this statute and invalidated a regulation which constituted impermissible legislation by the VA. Miller v. United States, 294 U.S. 435, 439-440 (1935). That is exactly what the Secretary's enactment of Section 3.358(c)(3) constitutes in this case.[4]

The structure of the statute itself presumes a no-fault basis in that compensation "shall be paid" for injury suffered "as a result of" four different circumstances: (1) hospitalization; (2) medical or surgical treatment; (3) the pursuit of a course of vocational rehabilitation; or (4) the conduct of medical examination required by any provisions of Title 38. The VA fault requirement for medical care in one category is inconsistent with the absence of a requirement for fault in the other three categories. There are only two limitations to the mandatory grant of service-connected benefits under the statute, both of which deal with causation only. First, the injury or aggravation of an injury must be "as a result of" one of the four circumstances enumerated. Second, benefits are not available to a veteran where the cause of the injury is "the result of such

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[4] The Court of Veterans Appeals struck down the regulation under its own Congressional mandate to "hold unlawful . . . regulations issued or adopted by the Administrator . . . found to be in excess of statutory . . . authority . . . or in violation of statutory right." 38 U.S.C. § 7261(a)(3)(C).

veteran's own willful misconduct." While there are a multiplicity of additional factors -- including fault on the part of VA personnel or "accident" however defined -- which might be expected to operate in any of the four circumstances, none are mentioned in the statute as grounds for limiting the mandatory obligation of the Secretary to treat such injuries as service-connected. Nor is there an explicit or implicit grant of discretion to the Secretary to withhold service-connected benefits where the terms of the statute are met.

The simple and straightforward language of the statute is reinforced by the overall structure of the statutory scheme of veterans benefits. See Bethesda Hospital Assn. v. Bowen, 485 U.S. 399, 403-405 (1988). The parallel statutory provisions of Sections 1110 and 1131 governing entitlement to disability compensation for conditions arising out of wartime and peacetime service do not require the veteran to prove fault on the part of the service department, although their terms are nearly identical to Section 1151. Compensation entitlement is established under those sections as long as there is a simple temporal relationship between the incurrence of the disability and a period of active service. 38 U.S.C. § 105. In this regard, Section 1110 provides a guarantee of compensation to active military personnel for "disability resulting from personal injury suffered or disease contracted in line of duty . . . during a period of war." Similarly, Section 1131 provides a guarantee of compensation for active military personnel for "disability resulting from personal

injury suffered . . . during other than a period of war." Both Section 1110 and Section 1131 contain the allegedly ambiguous word "resulting" -- which, according to the Secretary, offends the plain meaning of Section 1151. Yet under these statutes, a veteran who suffers a surgical injury while in service receives service-connected compensation after discharge without proof of fault.

The Secretary has not promulgated any regulations incorporating a fault element into Sections 1110 and 1131. On the contrary, the VA has promulgated a regulation which guarantees compensation under Sections 1110 and 1131 for all disabilities which proximately flow from the original wartime or peacetime disability, also on a strictly no-fault basis. See 38 C.F.R. 3.310(a). Under these statutes and regulation, a veteran who receives treatment for a service-connected condition and suffers an additional injury, such as the one Mr. Gardner suffered, would receive compensation benefits for the surgical injury without being required to demonstrate fault.[5]

The outcome of the interplay of the Secretary's regulations -- imposing a fault requirement on Mr. Gardner but not on those who have service-connected injuries -- is that a veteran may obtain further compensation for disability caused by medical

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[5] The Secretary acknowledges this difference in his petition at 6 n.3, but he asserts that Section 1151 is to be distinguished from Sections 1110, 1121, and 1131 benefits based on the fault requirement. However, the four statutory provisions are virtually identical in form and wording. The fault requirement imposed on Section 1151 claims is derived solely from the Secretary's regulation and not the Congressional scheme.

treatment without fault only if the original disability for which care was sought is service-connected. However, a veteran identically situated -- but for the fact that the disability for which he seeks treatment is not service-connected -- may not receive service-connected compensation for the new disability caused by medical treatment, unless the veteran meets the complex burden of proving that a departure from standard medical practice caused the new disability. The disparity is highlighted by the fact that the veteran seeking treatment in a VA facility for a service-connected disability may have incurred that disability while on leave from active duty. For example, if Mr. Gardner -- while on active duty but on leave -- had slipped and fallen on the steps of his trailer home and suffered a herniated disc, any "bad result" of the subsequent in-service or post-service surgery would be treated as service-connected.

Because it is rational and proper to treat these two cases alike, it is reasonable to assume that Congress intended this result. Both veterans are compensated for the "bad result" of their medical care on a no-fault basis. That was the primary focus of Congress. In any event, as Chief Judge Nebeker recognized, it cannot be said that such an intent on the part of Congress was "impossible" or clearly absurd. (Pet. App. at 26a, citing Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring)). Nor is there any evidence of a contrary legislative intent to treat these classes differently. In his petition, the Secretary never addresses the

complete lack of evidence that Congress intended to treat the hospitalized veteran and the active duty person differently under identical circumstances. On the contrary, in O.G.C. Precedent Opinion 80-90 (July 18, 1990), his own General Counsel stated that Congress did not intend there to be a distinction between recipients of so-called "quasi-service-connected" benefits under Section 1151 and recipients of benefits under Sections 1110 and 1131. "If Congress had intended to preclude such payment, it would have expressed recognition of the inconsistency by specifically excluding such class of claimants." (C.A. App. at 124)[6]

The Secretary also argues that the word "injury" in the statute "could well include some connotation of fault or of an unforeseen and untoward occurrence." (Pet. at 10-11). As an argument that the statute is ambiguous, it is weakly put. The Secretary asserts that "no single dictionary definition can by itself supply an unambiguously correct meaning for the word in its statutory context." (Pet. at 11) (emphasis supplied). This begs the question. The "correct" meaning of the word "injury" -- whatever that may be in the view of the Secretary -- does not require or even suggest imposition of a fault requirement in the statute. Nowhere in the companion provisions of Section 1110 and 1131 -- or in the multiple provisions of the statutory scheme where the word is used elsewhere -- has either Congress or the

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[6] A Precedent Opinion of the General Counsel is conclusive within the Department on the issue addressed. 38 C.F.R. § 14.507.

Secretary seen fit to remedy this supposed ambiguity in the word "injury." For example, Congress employed a common sense use of the word "injury" to define "aggravation" in the statute: "A preexisting injury or disease will be considered to have been aggravated . . . where there is an increase in disability . . . ." 38 U.S.C. § 1153. The key to the application of Section 1151 is actually to determine whether the veteran has suffered an increase in disability. Under 38 C.F.R. § 3.358(b)(1) the VA simply conducts a comparison of the veteran's condition before the surgery with his condition after the surgery to determine whether there is additional disability, a fundamentally straight-forward process the VA engages in every day.

The Secretary seems to argue that the words "as a result of" also create an ambiguity. (Pet. at 11). However, there is no explanation by the Secretary as to why these words are ambiguous in and of themselves. Instead, the Secretary suggests that "it is by no means self-evident from the statutory text alone" that a statistical percentage of adverse complications resulting from appropriate treatment should be compensated. (Pet. at 11). Compensation for adverse surgical outcomes, however, is exactly what the text of the statute requires. And, indeed, that is exactly how the statute was administered at least in the first two years after its enactment. While the Secretary might believe that this outcome "should" be precluded, Congress has thus far not acted on his last request to amend the statute. See S. 2383,

102d Cong., 2d Sess. (1992); 138 Cong. Rec. S4040 (daily ed. March 20, 1992).[7]

The courts below agreed that the omission of an element of fault in the statute is no oversight. The 1924 precursor of Section 1151, Section 213 of the World War Veterans' Act, Public Law No. 68-242 (1924), was presented as a bill to amend the "war risk insurance" act. Hearings Before the House Committee on World War Veterans' Legislation, 68th Cong., 1st Sess. 113 (1924) [1924 Hearings]. Section 213 was clearly characterized at its inception as remedial legislation. See S. Rep. No. 397, 68th Cong., 1st Sess. 5 (1924). That the statute was part of an insurance program fortifies the observation of both courts below that Congress designed a no-fault scheme "given its experience in enacting legislation concerning both common law negligence and the no-fault approach to liability." (Pet. App. at 8a, 26a).

That Congress considered and rejected the concept of relative fault on the part of VA medical personnel is clear from the single exclusion of compensation benefits where the veteran is guilty of "willful misconduct." This demonstrates that the veteran is protected against even his own simple negligence, even

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[7] The VA's concern that compensation may be required for the amputation of a gangrenous leg to save the veteran's life is inappropriate. Not all disabilities which exist after medical or surgical treatment are compensable. If the resultant condition is the product of the "continuance or natural progress of disease or injuries for which the . . . hospitalization, etc., was authorized," that disability does not occur "as a result of" the medical or surgical treatment. 38 C.F.R. § 3.358(b)(2). Compensation is also denied where the additional disability is "merely coincidental" with the treatment. 38 C.F.R. § 3.358(c)(1).

though contributory negligence was a standard defense in fault-based systems in 1924. This no-fault approach is also consistent with both state and federal worker's compensation schemes. Congress cannot have overlooked a requirement of fault on the part of the VA where it carefully crafted such a modest exclusion to compensation based on the willful misconduct of the veteran. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983).

As the Solicitor General made clear in his brief as amicus curiae in Conroy v. Aniskoff, even if there were ambiguity in the statute, the Secretary is obligated to resolve that ambiguity in favor of the veteran "under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." King v. St. Vincent's Hosp., 502 U.S. ___, 112 S.Ct. 570, 574 n.9 (1991). See also Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946); Boone v. Lightner, 319 U.S. 561, 575 (1943). Indeed, in a similar context as we indicated above, the Secretary has recognized and applied this precept to the benefit of veterans. See O.G.C. Prec. Op. 80-90 (July 18, 1990), citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). His failure to have even considered this precept in this case is at least puzzling.

Finally, the fault requirement of the regulation is inconsistent with the entire policy of VA compensation as recognized by decisions of COVA and by enactments of Congress. The veteran is entitled to the benefit of the doubt in all proceedings. 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102 (1990); Gilbert v. Derwinski, 1 Vet.App. 49 (1990). The VA is required to apply a broad and liberal interpretation to its rules. 38 C.F.R. § 3.303(a). The VA has a duty to assist the veteran in the investigation and presentation of his case before the VARO and the BVA. 38 U.S.C. § 5107(a); Murphy v. Derwinski, 1 Vet.App. 78 (1990). Independent expert medical opinions are available in some cases. 38 U.S.C. § 5109. Congress has also concluded that for certain medical conditions, the veteran is entitled to a presumption of service connectedness in evaluating entitlement to compensation. 38 U.S.C. §§ 1112, 1116. Imposing the complex burden of proving malpractice as a predicate for compensation is at odds with the entire VA system of benefits.

2. As the Court of Appeals correctly observed, "[r]ecourse to the legislative history of [section 1151] is unnecessary in light of the plain meaning of the statutory text," quoting Darby v. Cisneros, 509 U.S. ___, 113 S.Ct. 2539, 2545 (1993).

While resort to legislative history is not justified in this case, even that history does not manifest a "clearly expressed legislative intent to the contrary" of the plain meaning of the statute that might warrant a different construction. National Organization for Women v. Scheidler, 114 S.Ct. at 806, quoting

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). There is no such legislative mandate in this case. Indeed, at best the Secretary argues that the legislative history "raises at the very least a significant question as to whether Congress intended to enact a no-fault compensation scheme." (Pet. at 12). Such admitted ambiguity in the legislative history cannot justify review in this case.

The Secretary concedes in this Court, as he has throughout this litigation, that the legislative history surrounding the original enactment of the statute in 1924 supports both a no-fault scheme and a fault based scheme. (Pet. at 13). Of course, a no-fault scheme necessarily includes compensation for fault. Therefore, the contemporaneous evidence of congressional intent surrounding the 1924 enactment supports enforcement of the plain language of the statute. The Secretary, however, argues that the regulations enacted by the VA in 1926 and 1927 disclose a contemporaneous intent by the agency to require fault. (Pet. at 13-14). Even assuming these regulations are "contemporaneous" with the 1924 enactment, the Secretary parses these three regulations improperly. Regulations Nos. 137, 157, and 167 do not definitively preclude recovery in the absence of proof of fault or accident. Regulation No. 137 essentially precludes recovery for conditions arising out of the natural progress of the disease or injury being treated and acknowledges that recovery is available for additional injury resulting from treatment "improperly given." (C.A. App. at 102). There is no

requirement that fault be shown as a predicate to compensation. While No. 157 permits recovery in instances of fault, it does not preclude recovery in the absence of proof of fault. Regulation No. 167, on the other hand, actually liberalized the standard under No. 157 by providing that "[t]he usual after results of approved medical care and treatment properly administered will not be held as entitled to payment." (C.A. App. at 104). The Federal Circuit was correct to observe the lack of precision in this language and further observed that "it does not appear that [under any of these regulations] the VA actually excluded disability claims where the veteran could not prove fault or accident," citing two opinions of the Attorney General and an opinion of the Comptroller General. (Pet. App. at 14a). The court also noted that the VA did not take the position that proof of fault was an absolute prerequisite until August 1934. (Pet. App. at 16a).

The Secretary cites for support two adjudicatory opinions of the VA from 1928 and 1930 and the same Comptroller General opinion referenced by the Court of Appeals. While the Secretary cites these VA adjudications to suggest that the practice of the VA was to employ a fault-based methodology (Pet. at 14), those findings actually deal only with the causation issue. 65 Op. VA Gen Coun. 429 (1930); 50 Op. VA Gen. Coun. 439 (1928).[8] They

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[8] Claim of Frank McKeown deals with a veteran whose fingers were severed when they were slammed in a door. Claim of William Concannon deals with emergency dental care. Neither turns on the issue of fault. There is no other evidence cited by the Secretary in support of his claim that the VA actually

are entirely consistent with opinions of the Attorney General of the United States rendered in response to requests for legal advise from the Secretary, upon which the Federal Circuit relied. See 35 Op. Att'y Gen. 76 (1926); 36 Op. Att'y Gen. 61, 63 (1929); Pet. App. at 14a. Intentional departures from the statutory mandate and from the opinions of the Attorney General do not create the kind of consistent agency practice which is entitled to deference. Suffice to say, the conclusions expressed in these early proceedings hardly constitute contemporaneous evidence of a Congressional intent explicitly at odds with the plain language of Section 1151.[9]

Since the contemporaneous evidence surrounding the enactment in 1924 supports the plain language reading of Section 1151, the Secretary must rely exclusively on the argument that the 1934 reenactment implicitly adopted a fault-based analysis because that reenactment was "against the backdrop of a well-established fault-or-accident requirement" supposedly set forth in the three regulations promulgated in 1926 and 1927. (Pet. at 15-16). The Secretary's regulation cannot be saved in this case by employing the fiction that Congress is presumed to know of, and thereby to have adopted, an agency's interpretation when it re-enacts a statutory provision without change. When a regulation conflicts

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required proof of fault prior to August 1934.

[9] In the Comptroller General Opinion upon which the Secretary relies, the decision actually awarded benefits to the veteran who had developed dermatitis as a result of hospital x-rays without showing of fault. 9 Comp. Gen. 515 (1930).

with the statute, the fact of subsequent reenactment of the statute is immaterial, for Congress could not add to or expand the statute by impliedly approving the regulation. See Leary v. United States, 395 U.S. 6, 24-25 (1969), citing Commissioner v. Acker, 361 U.S. 87, 93 (1959). This Court has also noted that it is not realistic to infer approval of an administrative interpretation from Congressional silence. See United States v. Rutherford, 442 U.S. 544, 554 n.10 (1978). Reenactment is not proof of approval where there is no evidence that Congress gave any particular consideration to the Secretary's regulation during reenactment of the statute. See Rowan Cos. v. United States, 452 U.S. 247, 262 (1981); United States v. Calamaro, 354 U.S. 351, 359 (1957). Indeed, where the focus of Congress is on matters other than the agency's regulation, the failure to overturn the agency's regulation clearly falls short of supporting a construction at odds with the statute's plain meaning. See Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980). As this Court has often noted, it is at best treacherous to find in Congressional silence the adoption of a controlling rule of law. See Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969).

The only support for this reenactment argument the Secretary musters is isolated and cryptic comments by a single senator in 1934. (Pet. at 15). Once again, however, the Federal Circuit found that the senator's discussion "expressed the same commitment to compensation as that present in the discussion preceding the enactment of the 1924 Act." (Pet. App. at 15a).

Again, the evidence of the existence of a fault-based agency interpretation at reenactment in 1934 is no stronger than that surrounding the original enactment in 1924. Therefore, the Court of Appeals was correct not to attribute any significance to the reenactment of the statute insofar as it relates to the validity of the Secretary's regulation today.[10] Indeed, this is the same conclusion that the VA General Counsel reached in his most recent discussion of the history of Section 1151. "[T]he legislative history surrounding reenactment of this provision must be considered somewhat ambiguous." O.G.C. Precedent Opinion No. 99-90 (December 24, 1990) (C.A. App. at 109).

Congressional silence as the statute was amended four times since 1934 similarly does not justify disregarding the clear language of the statute. First, the amendments had nothing to do with the fault concept. Second, the 1962 amendment actually supports the plain meaning given the statue by the courts below. In that year, Congress removed the two-year period of limitations for Section 1151 claims and required an offset for amounts recovered by a veteran under the Federal Tort Claims Act, which is a fault-based statute. 28 U.S.C. § 1346(b). That change makes clear that Section 1151 benefits and a veteran's rights under the FTCA are compatible but not identical. The FTCA requires fault, has a circumscribed period of limitations, has a right to trial before an Article III judge, and would entitle a

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[10] The Secretary's argument that the "historical context" of the 1934 reenactment supports his view is sociological conjecture. (Pet. at 16 n.7).

veteran to compensation for pain and suffering and lost wages upon a showing of malpractice. On the other hand, Section 1151 contains none of the restrictions of the FTCA but provides a more limited range of compensation. It is not logical to conclude that where Congress carefully prescribed the terms under which it would waive the sovereign immunity of the United States under the FTCA in 1946, it previously intended to impose similar limitations on Section 1151 benefits by its silence. As the Federal Circuit observed:

> [T]here is no indication whatsoever in the legislative history or in the resulting legislative enactment that Congress intended to place on the veteran the complex and difficult burden of proving that negligence or an accident actually occurred during treatment as a condition to compensation.

(Pet. App. at 17a). Where Congress has desired to express a fault requirement as in the FTCA, that intent is made unmistakably clear.[11]

The final word on whether Congress has impliedly adopted the VA fault-based interpretation of Section 1151 also comes from an opinion of the VA's own General Counsel. In March of 1984, the General Counsel was asked whether Section 1151 benefits would be available to a veteran injured by medical treatment in a military hospital under VA auspices, as opposed to claims arising in VA medical facilities. On the issue presented the General Counsel observed as follows:

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[11] This Court has held that the existence of Section 1151 benefits does not preclude a negligence action under the FTCA. United States v. Brown, 348 U.S. 110 (1954).

Over the years, Congress has amended section 351 [current section 1151] and its predecessors but has not sought to challenge VA's interpretation by amendment or otherwise. It may, therefore, be urged that Congress has impliedly approved the requirement of VA error or fault in the current regulation. Although we would not rule out resort to this rule of statutory construction in a proper case, we do not consider it applicable here because we doubt a court would agree. Kirkhuff v. Nimmo, 683 F.2d 544 (D.C. Cir. 1982), is an excellent guide to obtaining judicial deference to our interpretations.

* * * * *

We do not believe a court would accord a similar deference to the interpretation in question here. In Kirkhuff, the statutes . . . were arguably inconsistent, necessitating resort to rules of statutory construction. That is not the case here where the interpretation is a gloss on a statute that on its face does not require VA fault. Also, in Kirkhuff, there was an unambiguous history of administrative consistency, which cannot be said of the VA decisions involving section 351 and its predecessors. We believe a court would, in the absence of affirmative congressional consent, be extremely reluctant to defer to VA's foreclosure of liability in this case.

O.G.C. Digested Opinion 212B (March 8, 1984) (emphasis supplied).

3. Because the statute is plain on its face, the Court of Appeals did not err in refusing to defer to the Secretary's asserted long-standing interpretation of the statute. In any event, no agency is entitled to deference to a history of inconsistent and ambiguous interpretations of a statute. Burnet v. Chicago Portrait Co., 285 U.S. 1, 16-17 (1932). See also EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991); Southeastern Community College v. Davis, 442 U.S. 377, 411-12

(1979); National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979); Morton v. Ruiz, 415 U.S. 199, 237 (1974). The history of the so-called "long-standing" fault-based interpretation of Section 1151 is set forth in O.G.C. Precedent Opinions 2-78 and 99-90 (C.A. App. at 105, 126), which depict an agonizing maze of ineffective efforts to define what is meant by "accident" in order to ameliorate the restrictive fault-based gloss placed on the statute by the VA. As the General Counsel conceded in his 1984 opinion cited above, the history of the VA interpretation of Section 1151 is so inconsistent it does not justify any deference by a court. O.G.C. Digested Opinion 212B.

The two VA General Counsel Precedent Opinions demonstrate that when the 1924 Act was initially applied in the field, those adjudications employed the literal language of the act. Therefore, decisions were rendered on the premise that "compensation was payable under section 213, irrespective of whether there was any fault on the part of the Bureau personnel." Memorandum of the Solicitor, October 24, 1935, at 3 (C.A. App. 109). Thereafter, however, numerous efforts were made by regulation and precedent opinion to restrict benefits to cases of "accident" or fault. All of these efforts can be traced to a single comment by General Hines in the 1924 hearings which incidentally had no bearing on the actual language of the 1924 Act:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness -- things that must sometimes happen -- the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof.

1924 Hearings at 113 (emphasis supplied).

While it is apparent that General Hines was using the word "accident" to denote a no-fault outcome in contrast to negligence -- as COVA observed in its decision below (Pet. App. at 28a) -- the subsequent interpretations given the term "accident" by the VA attempt to identify a category of cases somewhere between no-fault and negligence. Regulations Nos. 137, 157, and 167 are themselves examples of failed attempts to define this notion. Indeed, in O.G.C. Precedent Opinion 99-90, the General Counsel acknowledged that the reference to "accident" by the Comptroller General decision reported at 9 Comp. Gen. 515 (1930), which drove these definitional efforts, was actually "gratuitous and largely irrelevant obiter dictum." (C.A. App. at 111). That interpretation nevertheless was carried over in Administrator's Decision No. 255 (August 9, 1934), which first concluded that benefits were payable only when the injury arose through accident, carelessness, or negligence. Id.

This view was altered yet again in July of 1953 when the VA Solicitor explained that benefits were payable only if injury was caused by "accidental means." (C.A. App. at 112). There is no explanation in the 1990 Precedent Opinion as to what this modification meant in the context of Section 1151 benefits. The

regulation was modified yet again in 1961. In the 1978 Precedent Opinion, the General Counsel concluded that the 1961 regulation accepted the "ordinary meaning of the word 'accident' [as] opposite that of 'negligence.'" (C.A. App. 112). It is again not clear that the 1961 regulation, however, was meant to provide compensation in no-fault circumstances as "opposite that of negligence." In the 1978 amendment to the regulation, generated by the General Counsel's expressed dissatisfaction with the 1961 interpretation, the concept of "accident" as opposite "negligence" was translated into a new definition of "accident" as "any unforeseen, untoward result." (C.A. App. at 130); 43 Fed. Reg. 51015 (November 2, 1978). Yet in 1990, the General Counsel concluded that even that definition did not "allow grants of benefits in certain cases we believe fall reasonably within the realm contemplated by Congress when creating this benefit." O.G.C. Prec. Op. 99-90 (C.A. App. at 113). Believing that even the 1978 definition -- the current provision involved in this case -- "is too restrictive in view of the legislative history" of Section 1151, the Secretary has proposed yet another regulation re-defining the notion of "accident" to prevent unfair results in adjudicating Section 1151 benefit claims. That new regulation has not been adopted. However, the terms of that regulation were included in the failed legislative amendment

proposed by the Secretary in response to the decision of COVA in this case. See S. 2383, 102d Cong., 2d Sess. (1992).[12]

Therefore, rather than demonstrating a long-standing agency interpretation of a statute, VA history reveals no less than eleven different definitions or interpretations of the word "accident" even though that word appears nowhere in the statute. The VA does not even believe that the regulation as it exists today accurately reflects Congressional intent. The problem is aptly summarized by the General Counsel himself in the 1978 Precedent Opinion: "Some of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether benefits were payable. . . ." O.G.C. Prec. Op. 2-78 at 3 (C.A. App. at 128).

4. This Court should not review the Federal Circuit's eminently reasonable conclusion that regulations of the VA should be subject to "vigorous review." (Pet. App. at 20a).

As the Federal Circuit recognized, Section 1151 benefits constitute a potential "statutory right" conferred by Congress. (Pet. App. at 21a). The Secretary may not regulate away those rights by using his limited authority to enact regulations under 38 U.S.C. § 501. That authority does not include the right to

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[12] It is interesting to note that in support of that legislative amendment to Section 1151, the Secretary opined that the decision in this case would cost $5 billion in the next five years. 138 Cong. Rec. S4040 (daily ed., March 20, 1992). Now before this Court that figure is down to $1 billion. (Pet. at 19).

enact substantive regulations affecting individual rights in a manner which is at odds with the administrative structure Congress has enacted into law. See ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988). This Court has made clear that VA regulations which are inconsistent with Congressional statutes constitute impermissible legislation. Miller v. United States, 294 U.S. at 439-440. Where Congress intends to permit such substantive rule-making by the VA, it specifically so provides. See, e.g., Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984).

There is no reason to require a less restrictive review of such regulations than that enunciated by the Federal Circuit. The very reason for the creation of the Court of Veterans Appeals was the history of ineffective and unfair VA adjudication of veterans' benefits. As Senator Cranston stated in support of creation of the Court of Veterans Appeals:

> [A]nother basic reason for judicial review legislation is the need to establish a basis for review of questionable agency actions restricting, withholding, or withdrawing VA benefits. . . . There is also the potential for unduly restrictive legal opinions from the Office of the General Counsel which may operate to deny veterans access to benefits to which they are entitled under the law.
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> I am suggesting that outside review by an independent entity to determine whether governmental action is legal and whether it is fundamentally fair would benefit all parties involved. The VA would have its processes subjected to appropriate scrutiny

> and, to the extent the agency's actions were upheld, would be vindicated. Likewise, to the extent the agency's actions were held unlawful or fundamentally unfair, steps could be taken to improve the process so as to ensure that the agency is fulfilling its mission to serve veterans in the best possible fashion.

134 Cong. Rec. 31465 (October 18, 1988).

This vigorous review is also shown to be justified by the jurisprudence of the Court of Veterans Appeals in the six years of its life. COVA has repeatedly criticized the VA for its misinterpretation of Congressional statutes and for VA's intransigence and reluctance to conform its practices to the realities of judicial review. For example, in Jones v. Derwinski, 1 Vet. App. 596 (1990), the VA had to be enjoined from directly contacting represented veterans and from providing to veterans outdated and erroneous information. The Secretary was also sanctioned for not promptly correcting an inaccurate representation made to the court upon discovery of that inaccuracy. In Fugere v. Derwinski, 1 Vet. App. 103 (1990), aff'd 972 F.2d 331 (Fed. Cir. 1992), COVA held that the VA could not rescind a protective directive from its adjudication manual without public notice and comment. In Tobler v. Derwinski, 2 Vet. App. 8 (1991), COVA was obligated to direct the VA to apply the decisions of the court as precedent in adjudicating claims at the regional offices and before the BVA. In Hines v. Derwinski, 2 Vet. App. 30 (1991), COVA issued a show cause order as to why costs should not be granted against the VA for failing to respond to a veteran's record request for over six years. In Adamski v.

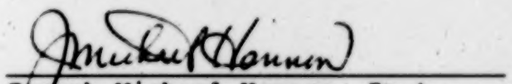
Derwinski, 2 Vet. App. 46 (1991), COVA sanctioned the VA for dilatory tactics in failing to file the record on appeal when ordered. In Moore v. Derwinski, 2 Vet. App. 67 (1992), COVA ordered the Secretary to show cause why he should not be subject to contempt for failing to pay benefits as ordered by the court. In King v. Brown, 4 Vet. App. 519 (1993), COVA complained of the VA failure to provide an accurate and relevant record and basis for decisions on appeal.

These and numerous other decisions make clear that judicial review of VA's regulations and adjudicatory practices was sorely needed. As the Federal Circuit noted, Congress's lengthy deliberation over the Veterans' Judicial Review Act, and its carefully crafted scheme for judicial review of VA regulations, counsels for "vigorous review." There is nothing about that language which contravenes precedent of this Court or prohibits deference to the Secretary where appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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